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No. _____

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1988

C. ROBERT SATTI and LESTER J. FORST,
*Petitioners,*

v.

FRANCELLE DORMAN,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Is Connecticut's "Hunter Harassment Act" facially overbroad and vague, as the Second Circuit held in declaring the statute unconstitutional under the First Amendment?

2. Did the Second Circuit err in refusing to certify to the Connecticut Supreme Court questions of state law pertaining to the "Hunter Harassment Act," a statute never construed by any Connecticut court?

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OCTOBER TERM, 1988

C. ROBERT SATTI and LESTER J. FORST,
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v.

FRANCELLE DORMAN,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, C. Robert Satti and Lester J. Forst, in their official capacities as State's Attorney for the Judicial District of New London, Connecticut and Connecticut Commissioner of Public Safety, respectively, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on December 7, 1988.

## OPINION BELOW

The petitioners' appendix contains: (1) The order of the Second Circuit denying the petitioners' petition for rehearing, which included a suggestion for rehearing *en banc;* and (2) the opinion of the Second Circuit.

## JURISDICTION

The United States Court of Appeals for the Second Circuit decided this case on December 7, 1988. On January 31, 1989, the Second Circuit denied the petitioners' petition for rehearing, which included a suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment of the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment of the Constitution of the United States provides, in part, that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; . . ."

### Rule 17.1, Revised Rules of the Supreme Court of the United States

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

## STATUTES INVOLVED

Connecticut General Statutes § 53a-183a (1987 Rev.) provides that:

(a) No person shall: (1) Interfere with the lawful taking of wildlife by another person, or acts in preparation for such taking, with intent to prevent such taking; or (2) harass another person who is engaged in the lawful taking of wildlife or acts in preparation for such taking.

(b) Any person who violates any provision of this section shall be guilty of a class C misdemeanor.

Connecticut General Statutes § 51-199a (1987 Rev.) provides, in pertinent part, that: a "court of appeals of the United States" may certify "questions of law . . . which may be determinative of the cause then pending . . . and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state."

## STATEMENT OF THE CASE

### A. Summary Of The Facts

The respondent, Francelle Dorman, a Connecticut resident, was arrested during the goose hunting season for speaking to several hunters on state forest property located near her home in Niantic. The adjoining state lands contain marshlands inhabited by a variety of waterfowl. The respondent, who is opposed to the hunting and killing of animals, approached several hunters in the marsh and tried to dissuade them from their plans to hunt the waterfowl. The respondent "walked with the hunters . . . , [and] spoke to them about the violence and cruelty of hunting, of the beauty of the waterfowl and [of] their right to live peacefully and without harm." The hunters advised the respondent that her actions were unlawful, and when she refused to leave, summoned a state law enforcement officer who arrested her for violating the Hunter Harassment Act, Conn. Gen. Stat. § 53a-183a (1987 Rev.).

A state prosecutor subsequently moved the Connecticut Superior Court to dismiss the criminal charges, conceding that the arrest of the respondent had been premature because she had only been "talking about what she was going to do to interfere with hunting for geese." On April 22, 1986, the Superior Court dismissed the criminal charges.

### B. Proceedings In The District Court

Several months later, the respondent filed this action in the district court under 42 U.S.C. § 1983 against the petitioners, C. Robert Satti, State's Attorney for the Judicial District of New London, and Lester J. Forst, Connecticut's Commissioner of Public Safety. The respondent claimed, among other things, that her arrest and the threat of future enforcement of the Act violated her rights under the First

and Fourteenth Amendments of the United States Constitution. She sought a judgment declaring the Act facially invalid and injunctive relief prohibiting its enforcement. On cross-motions for summary judgment, the district court granted plaintiff's motion, holding as a matter of law that the Act, as written, is vague and overbroad under the First and Fourteenth Amendments. *Dorman v. Satti*, 678 F. Supp. 375 (D. Conn. 1988).

### C. Proceedings On Appeal

The petitioners timely appealed the district court judgment and moved the Court of Appeals, under Second Circuit Rule § 0.27, and Connecticut General Statutes § 51-199a (1987 Rev.), to certify to the Connecticut Supreme Court of the terms "interfere," "harass," and "acts in preparation," as used in the Hunter Harassment Act. The Second Circuit affirmed the district court and denied the petitioner's motion to certify questions of state law to the state supreme court.

Although no Connecticut court had considered or construed the Hunter Harassment Act, the Court of Appeals concluded that the subject statutory terms "do not admit of distinct limiting constructions" and that "the Connecticut court would be in no better position than a federal court to decide which interpretation is correct." App. at 549-550. On the merits, the court agreed with the district court that the Act was facially overbroad and vague and was unamenable to any narrowing construction. App. at 553-554. Circuit Judge Miner dissented on the certification question, concluding that the court "should have the benefit of the Connecticut Supreme Court's construction of the statute at issue before we pass on the merits of the plaintiff's claim that the legislation does not measure up to federal constitutional requirements." App. at 554.

## REASONS FOR GRANTING THE WRIT

### 1. THE SECOND CIRCUIT HAS DECLARED A STATE STATUTE FACIALLY OVERBROAD AND VAGUE UNDER THE CONSTITUTION OF THE UNITED STATES AND, THEREFORE, CERTIORARI REVIEW IS APPROPRIATE.

The Connecticut General Assembly has chosen, as is its prerogative, to protect hunters, trappers and fishers from those who engage in conduct which interferes with the lawful taking of wildlife by such persons. Connecticut General Statutes § 53a-183a (1987 Rev.), the "Hunter Harassment Act," proscribes intentional interference with persons taking wildlife and acts in preparation for this activity, as well as harassment of persons engaged in these lawful activities:

> (a) No person shall: (1) Interfere with the lawful taking of wildlife by another person, or acts in preparation for such taking; or (2) harass another person who is engaged in the lawful taking of wildlife or acts in preparation for such taking.
>
> (b) Any person who violates any provision of this section shall be guilty of a class C misdemeanor.

While it is true that statutory language prohibiting acts such as "interference" and "harassment" encompasses verbal as well as physical conduct; *Houston v. Hill*, 481 U.S. ____, 107 S.Ct. 2502, 2511-2512 (1987); this Court has upheld the validity of statutes regulating conduct containing an expressive component. *See Clark v. Committee for Creative Non-Violence*, 468 U.S. 288 (1984); (symbolic expression could be regulated because the underlying conduct was a proper subject of regulation); *United States v. O'Brien*, 391 U.S. 367 (1968) (the burning of draft cards, while containing expressive conduct, was properly proscribed). No different result is warranted here.

State statutes like the Hunter Harassment Act, which regulate expressive conduct but do so without suppressing or advancing any particular message, do not inevitably trod upon First Amendment protections. *See, e.g., City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986); *Broadrick v. Oklahoma*, 413 U.S. 601, 617 (1973). The Act on its face contains no prohibition nor approbation of any particular message at all; "indeed it is silent" as to the content of any expressive conduct proscribed under its sweep. *Members of City Counsel v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). It is directed not at the "content of speech but at any activity, including speech, that has the prohibited effects" of interference or harassment with the lawful activities of others. The Act therefore facially comports with the First Amendment. *Boos v. Barry*, ___ U.S. ___, 108 S.Ct. 1157, 1166 (1988).[1]

This Court should grant the writ of certiorari to correct the flawed constitutional analysis of the Second Circuit in light of these principles and to preserve the interests of federalism which accompany the invalidation of a state statute by a federal court.

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[1] In addition to these precedents, there existed other authority upon which the Second Circuit could have upheld the Hunter Harassment Act. *See Gormley v. Director, Connecticut State Department of Probation*, 632 F.2d 938 (2d Cir.), *cert. denied*, 449 U.S. 1023 (1980) (construing Connecticut's "telephone harassment" statute); *State v. Williams*, 205 Conn. 456, 473, 534 A.2d 230 (1987) (upholding Connecticut's "interfering with an officer" statute).

## 2. THE SECOND CIRCUIT ERRED IN REFUSING TO CERTIFY TO THE CONNECTICUT SUPREME COURT QUESTIONS OF STATE LAW PERTAINING TO THE "HUNTER HARASSMENT ACT," A STATUTE NEVER CONSTRUED BY ANY CONNECTICUT COURT.

The interests of federalism are starkly portrayed by the fact that, in invalidating the Hunter Harassment Act, the Second Circuit did so in the absence of construction of the Act by *any* Connecticut court. Indeed, the court even eschewed the opportunity, under Connecticut's certification statute, to receive an authoritative construction of the Act by the Connecticut Supreme Court, preferring instead to "construe" the statute itself. *See* Conn. Gen. Stat. § 51-199a. By its decision to select the broadest, most constitutionally troubling construction of the Hunter Harassment Act, without permitting the Connecticut Supreme Court to adopt a narrower one, the Second Circuit has committed plain error. *Frisby v. Schultz*, ____ U.S. ____, 108 S.Ct. 2495, 2501 (1988).

Federal courts should, of course, avoid invalidating a state statute before certification is used to provide an authoritative construction of the statute. *Virginia v. American Booksellers Association*, ____ U.S. ____, 108 S.Ct. 636 (1988); *Belotti v. Baird*, 428 U.S. 132, 151 (1988) (certification procedures "help build a cooperative judicial federalism"); *Kidney by Kidney v. Kolmar Laboratories*, 808 F.2d 955, 956 (2d Cir. 1987). Yet, this admonition bears little resemblance to Second Circuit's ultimate conclusion.

The paternalistic view that the Act was not "readily susceptible" to limiting construction and that "the Connecticut [Supreme] [C]ourt would be in no better position than a federal court to decide which interpretation [of the statutory terms] is correct"; App. at 549-550; conflicts with this Court's expanded use of state certification procedures. *See Virginia v. American Booksellers Association*, ____ U.S. ____, 108 S.Ct. at 644-45. Yet, the Second Circuit opinion goes

further; the court opines that *American Booksellers* does not "stand[ ] for the proposition that certification should be pursued whenever available," thus rationalizing its selection of the broadest unconstitutional construction of the Act in lieu of a narrower, constitutional construction which could be applied by the Connecticut Supreme Court. This plain error is compounded by the fact that *no* Connecticut court has ever had the chance to consider, let alone construe, the Hunter Harassment Act. *Frisby v. Schultz*, ____ U.S. ____, 108 S.Ct. 2495, 2501.

The opinion below, the petitioners respectfully submit, advances neither the objectives of certification procedures nor the decisions of this Court. While it may be true that certification "must not be a device for shifting the burdens of [a Court of Appeals] to those whose burdens are at least as great"; App. at 547–548 (internal quotation omitted); this is no reason to arbitrarily deprive a state supreme court of an opportunity to exercise its sovereign duty to construe state statutes.

The Connecticut Supreme Court, were it granted the chance to examine the Act, would not be bound by the constructions of the statute identified by the Second Circuit. App. at 550. A state supreme court has the authority to narrowly construe a state statute to avoid federal constitutional conflict; a federal court does not. *Houston v. Hill*, 481 U.S. ____, 107 S.Ct. at 2516; *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *see State v. Williams*, 205 Conn. 456, 473, 534 A.2d 230, 239 (1987) (applying these principles to a state statute).

Further, as Circuit Justice Miner aptly observed in his dissent, the Hunter Harassment Act "is subject to pruning by the Connecticut Supreme Court of any parts found to be contrary to law. The Connecticut severability statute allows for the excision of invalid portions of the Act without effect on the valid remainder. Conn. Gen. Stat. § 1-3 (1987); *State v. Golino*, 201 Conn. 435, 518 A.2d [57] (1986)."

These options are properly pondered only by the Connecticut Supreme Court. By its failure to permit the state supreme court the opportunity to construe the Hunter Harassment Act, the Second Circuit has erred and the petition for a writ of certiorari should be granted.

## CONCLUSION

The petition for a writ of certiorari should be granted. The judgment below should be summarily reversed with direction to grant the petitioners' motion for certification of questions of state law to the Connecticut Supreme Court.

Respectfully submitted:

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LESTER J. FORST
Petitioners

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## APPENDIX TO
## PETITION FOR A WRIT OF CERTIORARI
## TO THE UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

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Order of the United States Court of Appeals for the Second Circuit denying reargument with suggestion for reargument *en banc* . . . . . 1A

Opinion of the United States Court of Appeals for the Second Circuit . . . . . 2A

**United States Court of Appeals**
**for the**
**SECOND CIRCUIT**

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Thirty-first day of January, one thousand nine hundred and Eighty-nine

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FRANCELLE DORMAN,

Plaintiff-Appellee,

DOCKET NUMBER
88-7390

– V –

C. ROBERT SATTI, in his official capacity
and LESTER J. FORST, in his official capacity,

Defendants-Appellants.

---

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, C. ROBERT SATTI and LESTER J. FORST,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

/s/ Fredric Cassidy
Ch. Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 87—August Term, 1988

(Argued: September 28, 1988

Decided: December 7, 1988)

Docket No. 88-7390

FRANCELLE DORMAN,

*Plaintiff-Appellee,*

—v.—

C. ROBERT SATTI and LESTER J. FORST,

*Defendants-Appellants.*

Before:

OAKES, MINER, and ALTIMARI,

*Circuit Judges.*

Appeal from a judgment granting plaintiff-appellee's motion for summary judgment entered in the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*) declaring the Connecticut Hunter Harassment Act, Conn. Gen. Stat. § 53a-183a, unconstitu-

tional on its face under the first and fourteenth amendments to the United States Constitution.

Affirmed.

Judge Miner dissents in a separate opinion.

---

KATHLEEN ELDERGILL, Manchester, Connecticut (Beck & Eldergill, Manchester, Connecticut, of counsel), *for Plaintiff-Appellee.*

HARRY WELLER, Deputy Assistant State's Attorney, Wallingford, Connecticut (Joseph I. Lieberman, Attorney General, State of Connecticut, L.D. McCallum, Assistant Attorney General, Office of the Chief State's Attorney, Wallingford, Connecticut, of counsel), *for Defendants-Appellants.*

---

ALTIMARI, *Circuit Judge*:

In 1985, the Connecticut legislature enacted, as part of the state's penal code, the Hunter Harassment Act which provides as follows:

> No person shall: (1) *Interfere* with the lawful taking of wildlife by another person, or *acts in preparation* for such taking, with intent to prevent such taking; or (2) *harass* another person who is engaged in the lawful taking of wildlife or *acts in preparation* for such taking.

Conn. Gen. Stat. § 53a-183a (emphasis added). The Act, a class C misdemeanor, subjects the offender to a fine and/or imprisonment for up to three months. *Id.* §§ 53a-28; 53a-36(3).

On this appeal from the United States District Court for the District of Connecticut (Nevas, *J.*), we are asked to decide 1) as a preliminary matter, whether we should certify the statutory terms "interfere," "harass," and "acts in preparation" to the Connecticut Supreme Court for definitive interpretation under state law, and 2) assuming instead that we reach the merits, whether the district court properly determined that the Act, on its face, is unconstitutionally vague and overbroad under the freedom of speech clause of the first amendment. For the reasons that follow, we deny defendants-appellants' motion to certify questions of state law to the Connecticut Supreme Court and affirm the judgment of the district court granting plaintiff-appellee's motion for summary judgment declaring the Act unconstitutional on its face.

## BACKGROUND

On January 30, 1986, plaintiff-appellee Francelle Dorman, a resident of Niantic, Connecticut, was arrested during the goosehunting season for speaking to several hunters on state forest property located near her home. The adjoining state lands contain marshland inhabited by a variety of waterfowl. Plaintiff is morally opposed to the hunting and killing of animals, and consequently on the day of her arrest, she approached several hunters in the marsh and attempted to dissuade them from their plans to hunt the waterfowl. By her own admission, Dorman "walked with the hunters . . . , [and] spoke to them about the violence and cruelty of hunting, of the beauty of

the waterfowl and [of] their right to live peacefully and without harm." The hunters regarded her behavior as "antics," advised plaintiff that her actions were unlawful, and when she refused to leave, summoned a state law enforcement officer who arrested her for violating the Hunter Harassment Act, Conn. Gen. Stat. § 53a-183a (the "Act").

Following her arrest, the state prosecutor requested that the court dismiss the criminal charges, apparently conceding that the arrest of Dorman had been premature since she had only been "talking about what she was going to do to interfere with hunting geese." On April 22, 1986, the court granted the state's request and dismissed the criminal charges.

Four months later, Dorman filed the instant action in the district court under 42 U.S.C. § 1983 against defendants-appellants C. Robert Satti, chief prosecutor, and Lester J. Forst, the Commissioner of Public Safety. Plaintiff alleged, *inter alia*, that the actual arrest and the threat of future enforcement of the Act violated her rights under the first and fourteenth amendments, and she sought a judgment declaring the Act facially invalid and injunctive relief prohibiting the Act's enforcement. On cross-motions for summary judgment, the district court granted plaintiff's motion, holding as a matter of law that the Act, as written, is unconstitutionally vague and overbroad. *Dorman v. Satti*, 678 F. Supp. 375 (D. Conn. 1988). In May 1988, defendants filed a timely notice of appeal on the merits as well as a motion in this court under Second Circuit rule § 0.27 seeking certification to the Connecticut Supreme Court of the statutory terms "interfere," "harass," and "acts in preparation."

## DISCUSSION

I. *Certification.*

Second Circuit rule 0.27 provides that certification to the highest court of a state is appropriate 1) "[w]here authorized by state law" and 2) in order to resolve an "unsettled and significant question of state law that will control the outcome of a case pending before this Court." The Connecticut certification statute adopted in 1985 provides, *inter alia*, that a "court of appeals of the United States" may certify "questions of law . . . which may be determinative of the cause then pending . . . and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of th[e] state." Conn. Gen. Stat. § 51-199a(b).

The United States Supreme Court has encouraged the use of state certification procedures as an alternative to "the more cumbersome and . . . problematic abstention doctrine." *See Virginia v. American Booksellers Ass'n, Inc.*, 108 S. Ct. 636, 644 (1988). The purpose of certification is to obtain the benefit of an authoritative construction from the state's highest court before proceeding to the merits of the dispute. This may further the interests of federal/state comity by providing the state court with the opportunity to rule on an issue of state law before being precluded from doing so by a contrary federal court judgment. The state court's interest in accepting a certified question for review is particularly strong when it has not yet had the opportunity to interpret the pertinent statutory language. *Id.* at 645. Nevertheless, issues of state law "are not to be routinely certified to the highest courts of New York or Connecticut simply because a certification procedure is available. The procedure must not be a device for shifting the burdens of this Court to those whose burdens

are at least as great." *Kidney v. Kolmar Laboratories, Inc.*, 808 F.2d 955, 957 (2d Cir. 1987).

The test for determining the appropriateness of employing the certification procedure is whether the statute in question is "readily susceptible" to the proffered narrowing construction that would render an otherwise unconstitutional statute constitutional. *See American Booksellers*, 108 S. Ct. at 645; *Bellotti v. Baird*, 428 U.S. 132, 148 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). In attempting to satisfy the "readily susceptible" standard, defendants in the instant case rely by analogy on the Connecticut Supreme Court's recent consideration of vagueness and overbreadth challenges to the state's criminal interference with a police officer statute, Conn. Gen. Stat. § 53a-167a. *See State v. Williams*, 205 Conn. 456, 534 A.2d 230 (1987). That statute provides that it is unlawful to "interfer[e]," *i.e.*, to "obstruct[ ], resist[ ], hinder[ ] or endanger[ ]," a police officer "in the performance of his duties." In *Williams*, the Connecticut Supreme Court held that the statute was not unconstitutionally overbroad or vague because the act defines the term "interfer[e]" and limits its reach to conduct "intended to obstruct the police in the performance of their duties." *Id.* at 238. According to the *Williams* court, "a reasonable interpretation of the statute confines its scope to conduct that amounts to meddling in or hampering the activities of the police in the performance of their duties." *Id.* The court distinguished the Connecticut statute from the ordinance struck down by the United States Supreme Court in *Houston v. Hill*, 107 S. Ct. 2502 (1987), which prohibited interfering with a police officer " 'in *any* manner . . . in the execution of his duty,' " 107 S. Ct. at 2506 (emphasis added), by finding that the Connecticut

statute did not contain such a "broad sweep" of language. 534 A.2d at 238.

In construing the Connecticut statute to proscribe only physical conduct and "fighting" words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the court in *Williams* was able to fit the statute within the constitutional parameters of free speech. Defendant contends that the Connecticut Supreme Court should be given a similar opportunity to narrowly construe the Hunter Harassment Act. We disagree.

For this court to certify a question to the Connecticut Supreme Court, the Hunter Harassment Act must be "readily susceptible" to limiting interpretation. The district court found that the statute was "not susceptible to curative construction." 678 F. Supp. at 384. Although we are not bound by the district court's ruling, *Boos v. Barry*, 108 S. Ct. 1157, 1162-63 (1988); *American Booksellers*, 108 S. Ct. at 643-44; *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978), we agree with its determination. As Judge Nevas noted,

> [t]he lesson of *Williams* does not apply to the Hunter Harassment Act. First, because the Act fails to define the nature of the interference it proscribes, its language implicitly sweeps as broadly as that of the *Houston* ordinance, and it thus cannot be saved by a limiting construction as was Section 53a-167a. Second, in failing—by virtue of its "acts in preparation" clause—to limit the proscribed interference as to time and place, the Act carries its effect far beyond the proper scope of government regulation.

678 F. Supp. at 381-82.

Defendants cite language from *American Booksellers* to suggest that certification is appropriate whenever a state's highest court has not had an opportunity to rule on the pertinent statutory language. 108 S. Ct. at 645. While we agree that *American Booksellers* counsels in favor of expanded use of state certification procedures, we do not believe that it stands for the proposition that certification should be pursued whenever available. *Cf. Houston v. Hill*, 107 S. Ct. at 2514; *Kidney*, 808 F.2d at 957. The Supreme Court's willingness in *American Booksellers* to certify the proffered narrowing construction was a consequence of its decision to certify another question to the Virginia Supreme Court. Consequently, the Supreme Court found it unnecessary to decide whether the Virginia statute was subject to curative construction. The Court did not do away with the rule that certification is appropriate only when the statute is susceptible to a narrowing construction that will avoid the constitutional infirmity. *See Bellotti*, 428 U.S. at 148.

In sum, although the Supreme Court has required certification in cases where the state court could decide between two plausible interpretations of an ambiguous statute, *e.g.*, *American Booksellers*, 108 S. Ct. at 644; *Bellotti*, 428 U.S. at 144-48, and the parties in this case do offer conflicting interpretations of key terms in the Act, the Connecticut court would be in no better position than a federal court to decide which interpretation is correct. This is because, unlike the "unusual circumstances" presented in *American Booksellers* as well as in *Bellotti*, the statute in this case is so imprecise and indefinite that it is subject to any number of interpretations. The terms "interfere," "harass," and "acts in preparation" do not admit of distinct limiting constructions. They can mean anything. For this court to ask the Connecticut Supreme

Court to consider construing the statute to apply only to "core criminal conduct," as defendants would have it, would be tantamount to asking the Connecticut court "if it would care in effect to rewrite [the] statute." *Houston v. Hill*, 107 S. Ct. at 2515.

In view of the foregoing, we deny defendants' motion to certify questions of state law to the Connecticut Supreme Court.

II. *The Merits.*

When considering a facial challenge to the overbreadth and vagueness of a statute as measured against the first amendment, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). An act's overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. The purported vagueness must be such that the statute is incapable of "giv[ing] the person of ordinary intelligence a reasonable opportunity to know what is prohibited" by failing to provide "explicit standards" ensuring that it is not arbitrarily enforced. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Defendants argue that the statutory terms the district court found overbroad and vague "can and should be read in a manner consistent with the First Amendment." Appellants' Brief at 4. Plaintiff contends that because the Hunter Harassment Act does not define what constitutes interference or harassment and because the "acts in preparation" clause is not limited to any time, place or circumstance, the Act on its face impermissibly regulates protected free speech.

Plaintiff's facial attack on the constitutionality of the Act must be considered in light of the scope of the challenged government regulation. The Supreme Court has determined that statutory language prohibiting acts such as interference or harassment encompasses verbal as well as physical conduct. *Houston v. Hill*, 107 S. Ct. at 2511-12. Like the city ordinance struck down in *Hill*, the statute at issue here "deals not with core criminal conduct, but with speech." *Id.* at 2508. Consequently, the right of the government to prohibit such communicative expression is circumscribed by the first amendment. *See Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 45 (1983). "For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* (citations omitted).

Although the Act would appear by its terms to be content-neutral, *cf. Boos v. Barry*, 108 S. Ct. at 1162-64 (District of Columbia statute that prohibits display of picket signs *critical* of foreign government within 500 feet of that country's embassy is a content-based restriction), it clearly is designed to protect hunters from conduct—whether verbal or otherwise--by those opposed to hunting. *See* 678 F. Supp. at 377 & n.2; *cf. Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-48 (1986) (content-neutral statute is one not aimed principally at suppression of *speech* on the basis of its content). Of course, to the extent that the Hunter Harassment Act can be considered content-based, it cannot withstand strict scrutiny. There is no showing that protecting hunters from harassment con-

stitutes a compelling state interest. *Cf. Boos*, 108 S. Ct. at 1164 (first amendment protects "insulting, and even outrageous, speech in order to provide 'adequate "breathing space" ' " for exercise of right of free expression) (quoting *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 882 (1988); *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Nor is the statute narrowly drawn to serve any putative compelling state interest. Indeed, the Act "criminalizes a substantial amount of constitutionally protected speech." *Houston v. Hill*, 107 S. Ct. at 2512.

Taking the statutory terms "interfere," "harass," and "acts in preparation" at face value, even as content-neutral restrictions they cannot be justified as reasonable time, place or manner regulations of speech. *See Frisby v. Schultz*, 108 S. Ct. 2495, 2500-01 (1988); *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941). An "act[ ] in preparation" is nowhere defined in the statute, and thus the Act reaches a wide range of activities confined to no particular time, place or manner. *Cf. State v. Williams*, 534 A.2d at 238 (upholding state statute proscribing interference with police officer *in the performance of his duties*). As the district court recognized,

> the "acts in preparation" clause can be reasonably read to encompass buying supplies long before the actual hunt takes place . . . ; consulting a road map . . . ; making plans during a workplace coffee break; or even getting a good night's sleep before embarking on a hunting trip.

678 F. Supp. at 383. Accordingly, the Hunter Harassment Act is not the type of properly tailored statute, *Houston v. Hill*, 107 S. Ct. at 2511, that can be interpreted narrowly

to avoid constitutional infirmity. *Cf. Frisby*, 108 S. Ct. at 2501.

## CONCLUSION

Because we agree with Judge Nevas that Connecticut's Hunter Harassment Act is not subject to curative construction and as written is substantially overbroad and vague, defendants' motion to certify questions of state law to the Connecticut Supreme Court is denied, and the judgment of the district court declaring the Act unconstitutional on its face is affirmed.

---

MINER, *Circuit Judge*, dissenting:

Because I believe that we should, if possible, have the benefit of the Connecticut Supreme Court's construction of the statute at issue before we pass on the merits of plaintiff's claim that the legislation does not measure up to federal constitutional requirements, I respectfully dissent.

The Hunter Harassment Act, duly enacted by the legislature and approved by the Governor of the State of Connecticut, prohibits interference with and harassment of those engaged in lawfully taking, or preparing to take, wildlife. The majority concludes that the words "interfere," "harass," and "acts in preparation" contained in the Act are not readily susceptible to the limiting construction necessary to preserve the constitutionality of the statute. I think that this determination is unwarranted.

The word "interfere" in a statute imposing a criminal penalty for interfering with a police officer easily yielded to an interpretation by the Connecticut Supreme Court that preserved the constitutionality of the statute. *State v.*

*Williams*, 205 Conn. 456, 534 A.2d 230 (1987). The court in *Williams* confined the prohibited conduct "to meddling in or hampering the activities of the police in the performance of their duties." 534 A.2d at 238. A similar interpretation of the Hunter Harassment Act, substituting hunting activities for police duties, could save the Act from overbreadth and vagueness concerns. I cannot agree with the district court that the Act sweeps as broadly as the ordinance struck down in *Houston v. Hill*, 107 S. Ct. 2502 (1987). The prohibition on interrupting a police officer *in any manner* in the *Houston* ordinance left no room for any construction that would have saved the ordinance without rewriting it.

Similarly, "harassment" has been afforded a restrictive definition under Connecticut law. A statute prohibiting harassment by written and telephonic communications requires evidence of an intention to annoy or alarm another person. Conn. Gen. Stat. § 53a-183 (1987). New York has a similar statute, which is entitled "Aggravated harassment." N.Y. Penal Law § 240.30 (McKinney Supp. 1988). Indeed, the offense of harassment is described by reference to specific conduct in various penal codes. *See, e.g.*, N.Y. Penal Law § 240.25(1)-(5) (McKinney 1980); *see also id.* Practice Commentary following (referring to American Law Institute's Model Penal Code). There is therefore no reason why the Connecticut Supreme Court could not define harassment in the context of the Hunter Harassment Act without impinging on first amendment rights.

As to the term "acts in preparation," a narrowing construction might restrict the preparatory acts to those directly, unequivocally and immediately related to the act of taking wildlife. Here again, a construction considerate

of first amendment rights could save the statute. Moreover, the Hunter Harassment Act is subject to pruning by the Connecticut Supreme Court of any parts found to be contrary to law. The Connecticut severability statute allows for the excision of invalid portions of the Act without effect on the valid remainder. Conn. Gen. Stat. § 1-3 (1987); *State v. Golino*, 201 Conn. 435, 518 A.2d (1986).

In *Bellotti v. Baird*, 428 U.S. 132 (1976), the United States Supreme Court directed certification to the Supreme Judicial Court of Massachusetts of "questions pertaining to construction of a state statute that was susceptible to multiple interpretations, one of which would avoid or substantially modify a federal constitutional challenge," *Virginia v. American Booksellers Ass'n.*, 108 S. Ct. 636, 644 (1988). Similarly, a constitutional infirmity in the Act challenged here might be avoided by a decision of the Connecticut Supreme Court. If the term "harmful to juveniles," as defined in a Virginia statute prohibiting the display of certain visual or written materials, is considered subject to a narrowing construction by the Virginia Supreme Court after certification, *American Booksellers, supra*, then the objectionable terms in the Connecticut Hunter Harassment Act certainly should be capable of the sort of limiting construction that would meet constitutional challenges.

I would certify to the Connecticut Supreme Court questions as to the state law definitions of "interfere," "harass," and "acts in preparation" as used in the Hunter Harassment Act, before proceeding to a consideration of the merits of plaintiff's claim. I also would certify a question as to whether the Connecticut Supreme Court would excise any portion of the Act on state law grounds.

Supreme Court, U.S.
FILED
MAY 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1743

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1988

C. ROBERT SATTI and LESTER J. FORST,
*Petitioners,*

v.

FRANCELLE DORMAN,
*Respondent.*

## BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Should the Petition be denied where the Second Circuit fully considered and correctly decided the issues in this case, in accordance with prior rulings of this Court?
2. Are the issues raised here case-specific and not important enough to warrant this Court's review?
3. Did the Second Circuit properly refuse to certify to the Connecticut Supreme Court questions of state law pertaining to the Hunter Harassment Act?

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No. 88-1743

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# BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The respondent, Francelle Dorman, opposes the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on December 7, 1988, for the reasons set forth herein.

## REASONS FOR DENYING THE WRIT

### 1. BECAUSE THE SECOND CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES IN THIS CASE, IN ACCORDANCE WITH PRIOR RULINGS OF THIS COURT, THE PETITION SHOULD BE DENIED.

Defendants' Petition suggests that the Second Circuit opinion in this case conflicts with prior decisions of this Court, as well as the decision of the Connecticut Supreme Court. (Petition at 6-7, 7, n.1.) All of these cases were properly analyzed by the Second Circuit in its opinion, and the same arguments raised by Defendants here were rejected.

In reviewing prior decisions of this Court, the Second Circuit recognized that statutes may regulate expressive conduct without violating the First Amendment, regardless of whether those statutes are "content-based" or "content-neutral". (Opinion Below, Appendix to Petition (hereinafter "App.") at 11A, quoting Perry Education Ass'n. v. Perry Local Education Ass'n., 460 U.S. 37, 45 (1983). In this case, the Second Circuit analyzed the Hunter Harassment Act, considering both its legislative history and its language, and

found that it could not stand constitutional muster as either a "content-based" or "content-neutral" statute. The court properly reasoned that if the Act were considered "content-based", "[t]here is no showing that protecting hunters from harassment constitutes a compelling state interest ... nor is the statute narrowly drawn to serve any putative compelling state interest." (App. 11A-12A, citing Boos v. Barry, ___ U.S. ___, 108 S.Ct. 1157, 1164 (1988); Houston v. Hill, 481 U.S. ___, 107 S.Ct. 2502, 2512 (1987)). In reviewing the statute as "content-neutral", the court considered the language used in the Act, specifically the terms "interfere", "harass", and "acts in preparation", and found that these "cannot be justified as reasonable time, place or manner regulations of speech", and, therefore, that "the Hunter Harassment Act is not the type of properly tailored statute ... that can be interpreted narrowly to avoid constitutional infirmity." (App. at 12A-13A, citing Frisby v. Schultz, ___ U.S. ___, 108 S.Ct. 2495, 2500-01 (1988); Houston v. Hill, supra, 107 S.Ct. at 2511.)

With respect to controlling Connecticut law, the Second Circuit expressly addressed the Connecticut Supreme Court decision in

State v. Williams, 205 Conn. 456, 534 A.2d 230 (1987) cited in Defendants' Petition. (Petition at p.7, n.1.) As recognized by the Second Circuit, the Connecticut Supreme Court, in State v. Williams, considered vagueness and overbreadth challenges to a statute prohibiting interference with a police officer, Conn. Gen. Stat. Section 53a-167a. That statute punishes anyone who "interferes, obstructs, resists, hinders or endangers" a police officer "in the performance of his duties." Conn. Gen. Stat. Sec. 53-167a. In Williams, the Connecticut Supreme Court held that the statute was not unconstitutionally overbroad or vague because the Act defines the term "interferes" and limits its reach to conduct "intended to obstruct the police in the performance of their duties." 205 Conn. at 471, 534 A.2d at 238. (See Opinion Below, Appendix at 7A.)

2. **THE ISSUES RAISED HERE ARE CASE-SPECIFIC AND ARE NOT IMPORTANT ENOUGH TO WARRANT THIS COURT'S REVIEW**

A decision as to whether a given statute is unconstitutionally vague or overbroad necessarily requires an analysis of the challenged act, including both a review of its legislative history and the specific

language it uses. See generally, Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); Houston v. Hill, 481 U.S. ___, 107 S.Ct. 2502 (1987). In this case, the Second Circuit opinion set forth the correct legal principles to be used in determining the constitutionality of a statute. Even assuming arguendo that this Court were to disagree with the fine points of the Court's analysis or the result in this case, such disagreement would not warrant the granting of this Petition.

In this case, the Connecticut Legislature has proposed repeal of the Hunter Harassment Act at issue here, in response to the Second Circuit opinion declaring it unconstitutional. (See Appendix of the Respondent at 1A.) At present, this proposed legislation has been favorably reported upon by the Judiciary Committee and the Environment Committee, and will likely be voted on during this legislative session. Actual passage of

this new Act would render the issues raised here moot. The possibility of its passage, and the Legislature's apparent willingness to rewrite the statue, makes review here less important.

**3. THE SECOND CIRCUIT PROPERLY REFUSED TO CERTIFY TO THE CONNECTICUT SUPREME COURT QUESTIONS OF STATE LAW PERTAINING TO THE HUNTER HARASSMENT ACT.**

Under a long line of decisions of this Court, the test for determining the appropriateness of employing the certification procedure is whether the statute in question is "readily susceptible" to the proffered narrowing construction that would render an otherwise unconstitutional statute constitutional. Virginia v. American Booksellers Association, ___ U.S. ___, 108 S.Ct. 636, 645 (1988); Belotti v. Baird, 428 U.S. 132, 148 (1976); Erzonik v. City of Jacksonville, 422 U.S. 205, 216 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). (See Opinion Below, App. 7A.) Nothing in the American

Booksellers decision changes this test, as Defendants suggest. Rather, American Booksellers presented a unique situation, in which the parties offered two conflicting, plausible interpretations of the key terms in an ambiguous statute which the state court would be in a position to decide upon and resolve. See American Booksellers, supra, 108 S.Ct. at 644. No such circumstances exist here. Rather, the statute in this case is more like that at issue in Houston v. Hill, in that fashioning a narrowing interpretation of the Act would be tantamount to asking the Connecticut court to rewrite the statute. Houston v. Hill, supra, 107 S.Ct. at 2515.

The Connecticut Supreme Court has refused to rewrite statutes where language used is not susceptible to possible narrowing construction. French v. Amalgamated Local Union 376, 203 Conn. 624, 639, 526 A.2d 861, 868 (1987). Insofar as the dissenting

opinion below suggests that the Connecticut Supreme Court could, on its own, supply limiting language not contained in the statute, this suggestion must be rejected as contrary to well-settled Connecticut law. See, e.g., Greg v. Somers, 178 Conn. 207, 423 A.2d 873, 874 (1979) ("it is a fundamental rule, that, if its language permits, a statute will be construed so as to render it constitutionally valid." (emphasis added).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted:

FRANCELLE DORMAN,
Respondent

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No. 88-1743

In The
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1988

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C. ROBERT SATTI and LESTER J. FORST,
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APPENDIX TO
BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT

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PROPOSED LEGISLATION, REPEALING
THE HUNTER HARASSMENT ACT, CONN.
GEN. STAT. SECTION 53a-183a..... 1A

File No. 381

Substitue Senate Bill No. 245

STATE OF CONNECTICUT

**SENATE**

Senate, April 14, 1989. The Committee on Judiciary reported through SEN. AVALLONE, 11th DIST., Chairman of the Committee on the part of the Senate, that the substitute bill ought to pass.

AN ACT CONCERNING HARASSMENT OF HUNTERS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) (a) No person shall obstruct or interfere with the lawful taking of wildlife by another person at the location where that activity is taking place with intent to prevent such taking.

(b) A person violates this section when he intentionally or knowingly:

(1) Drives or disturbs wildlife for the purpose of disrupting lawful taking where another person is engaged in the process of lawfully taking wildlife;

(2) Blocks, impedes or otherwise harasses another person who is engaged in the process of lawfully taking wildlife;

(3) Uses natural or artificial visual, aural, olfactory of physical stimulus to affect wildlife behavior in order to hinder or prevent the lawful taking of wildlife;

(4) Erects barriers with the intent to deny ingress or egress to areas where the lawful taking of wildlife may occur;

(5) Intentionally interjects himself into the line of fire;

(6) Affects the condition or placement of personal or public property intended for use in the lawful taking of wildlife in order to impair its usefulness or prevent its use; or

(7) Enters or remains upon private lands without the permission of the owner or his agent, with intent to violate this section.

(c) Any person who violates any provision of this section shall have committed a class C misdemeanor.

(d) Any person convicted of a violation of this section who holds a license to take wildlife issued pursuant to part III of chapter 490 of the general statutes shall have such license revoked.

Sec. 2. (NEW) A law enforcement officer may order any person to desist from conduct in violation of section 1 of this act if the officer observes such conduct. Any person who fails to obey such order shall be guilty a class B misdemeanor.

Sec. 3. (NEW) The superior court may enjoin conduct which would be in violation of section 1

of this act upon petition by an aggrieved person or a person who reasonably may be aggrieved by such conduct, upon a showing that such conduct is threatened or that it has occurred on a particular premises in the past and that it is not unreasonable to expect that under similar circumstances it will be repeated.

Sec. 4. (NEW) Conservation officers, special conservation officers and patrolmen appointed by the commissioner of environmental protection under the authority of section 26-5 of the general statutes shall have the authority to enforce the provisions of this act.

Sec. 5. Section 53a-183a of the general statutes is repealed.

Committee Vote: 20 Nay 1

BACKGROUND

Court Case

In Francelle Dorman v. C. Robert Satti and Lester J. Forst, the U.S. District Court found Connecticut's harassment of hunters, trappers and fishermen law unconstitutionally vague and overbroad (Feb. 1, 1988, Civil No. H-86-989). This decision was upheld by the Second Circuit Court of Appeals (Dec. 7, 1988, Docket No. 88-7390). The statute (C.G.S Sec. 53a-183a, PA 85-351) made it a class C misdemeanor to intentionally try to stop another person from lawfully taking or preparing to take wildlife, or to harass such a person.

COMMITTEE ACTION

Judiciary Committee

Joint Favorable Substitute

Yea 20 Nay 1